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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RALPH R. MABEY, Examiner of A.H. Robins Company, Incorporated,

Petitioner,

—v.—

The Official Committee of Equity Security Holders of A.H. Robins Company, Incorporated; A.H. Robins Company, Incorporated; Dalkon Shield Claimants' Committee of A.H. Robins Company, Incorporated; and Legal Representative of Future Tort Claimants of A.H. Robins Company, Incorporated,

Respondents.

RESPONSE OF STANLEY K. JOYNES III, LEGAL REPRESENTATIVE OF FUTURE TORT CLAIMANTS OF A.H. ROBINS COMPANY, INCORPORATED TO PETITION OF RALPH R. MABEY, EXAMINER OF A.H. ROBINS COMPANY, INCORPORATED FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Stanley K. Joynes III, Legal Representative of the Future Tort Claimants of A.H. Robins Company, Incorporated (the "Debtor"), respectfully makes his response to the petition of Ralph R. Mabey, Examiner of A.H. Robins Company, Incorporated, for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fourth Circuit. This respondent supports the petition and urges that the requested writ be granted.

Summary of Argument

The petition seeks the issuance of a writ of certiorari to review a lower court judgment that blocked the establishment of a $15-million Emergency Treatment Fund designed to mitigate personal injury liabilities by restoring certain victims of the Dalkon Shield intrauterine device to fertility. The manufacturer of the Dalkon Shield was A.H. Robins Company, Incorporated, a company which is currently attempting to reorganize under Chapter 11 of the United States Bankruptcy Code. Although the establishment of the fund was authorized by the district court in the first instance, the court of appeals reversed the district court's decision, concluding that the establishment of the fund was not authorized by the Bankruptcy Code.

The district court's order authorizing the establishment of the fund to mitigate the Debtor's liabilities and to ameliorate a pressing public health concern is supported by several provisions of the Bankruptcy Code and reflects a sound effort to deal with the unique problems engendered by the increasing number of mass tort and environmentally driven bankruptcies. The judgment of the court of appeals for which review is sought does not acknowledge the modern-day realities attending such proceedings. Essentially, the court of appeals holds that the Bankruptcy Code prohibits a debtor from expending its resources, with court approval, to mitigate its liabilities for the benefit of the estate. In addition, the lower court concludes that the Bankruptcy Code requires that all creditors of equal rank receive distributions from the estate simultaneously. Neither of these principles is found in the Bankruptcy Code and, if adopted as the law, either notion would substantially frustrate important policies of the Code. Moreover, while this Court has not reviewed the precise issues presented here, the lower court's decision conflicts with the policy advanced in a recent decision of this Court.

Argument

Although not the subject of separate discussions in the lower court's opinion, three discrete principles of law are implicated by the question presented below. The first deals with whether a debtor operating its business under the reorganization provisions of the Bankruptcy Code can, consistent with 11 U.S.C. § 363(b), expend its assets to mitigate its disputed liabilities and rehabilitate its public image for the benefit of the estate. The second concerns whether the grant of equitable powers to a court sitting in bankruptcy under 11 U.S.C. § 105(a) is sufficiently broad to embrace the entry of an order permitting the expenditure of the debtor's resources to ameliorate a dangerous public health condition caused by the debtor's prebankruptcy conduct. The third principle in issue involves the question whether the general prohibition on interim distributions to unsecured creditors proscribes efforts by a debtor to mitigate its liabilities and to address a compelling public health concern where certain of the beneficiaries of the debtor's efforts are also creditors of the debtor. Correct application of these principles reveals that the establishment of the Emergency Treatment Fund pursuant to an order of the district court was within the mandate of the Bankruptcy Code and consistent with sound public policy.

The petition enumerates and discusses the pertinent authorities and that discussion will not be repeated here. Still, there remain several factors upon which amplification may prove enlightening.

(a) 11 U.S.C. § 363(b) And The "Business Judgment" Standard.

The lower court misapprehended the underpinnings of the petitioner's assertion that the establishment of the Emergency Treatment Fund was authorized by 11 U.S.C. § 363(b). (79a.) Section 363(b) specifically authorizes the use of property of the debtor's estate "other than in the ordinary course of [the debtor's] business . . . ." The case law has developed the standard applicable to § 363(b) to include substantial deference to an

exercise of the sound business judgment of the debtor's management. *See, e.g., In re Johns-Manville Corp.*, 60 Bankr. 612, 616 (Bankr. S.D.N.Y. 1986). When § 363(b) was offered to support the establishment of the fund below, the lower court's entire analysis was as follows:

> We can find no support for such a ["business judgment"] standard, and if such a standard does exist, it would not allow the Court to violate the clear dictates of the Bankruptcy Code, by paying certain unsecured claimants before their claims have been allowed and before a confirmed plan of reorganization is in place.

(8a.) It is at once apparent from the foregoing remarks that the court of appeals was unaware that the source of the "business judgment" standard is the Bankruptcy Code itself. This is an important, and perhaps dispositive, point.

The petitioner pointedly observes that, quite apart from the pressing humanitarian concerns to be addressed by the Emergency Treatment Fund, the establishment of the fund, in the Debtor's view, was bottomed upon the economic benefit that would flow to the estate through the mitigation of the Debtor's liabilities. Equally significant, though, is the unquantifiable economic gain that would accrue to the Debtor through the rehabilitation of its public image. The importance of this factor requires an appreciation of the nature of the Debtor's business and the sad legacy of the Dalkon Shield.

The preeminent business of the Debtor is the marketing of over-the-counter pharmaceuticals and allied products, such as the commonly known Robitussin, Dimetapp, and Chapstick. Inasmuch as the Debtor's primary source of business is the consuming public, its public image is and has long been among its most valued assets. Against this background, the ravages of ten years of notorious litigation over the Dalkon Shield resulted in economic detriment to the Debtor considerably beyond the payment of damages and defense costs, for its valued public stand-

ing was significantly diminished. This being so, the good will that would accrue to the Debtor from the establishment of the Emergency Treatment Fund in the form of a rehabilitated public image was easily something that could have formed the basis for an exercise of the Debtor's sound "business judgment." Indeed, the Debtor, a multi-billion dollar company, expends much, much more than $15 million annually on advertising alone, and certainly no one would be heard to suggest that these advertising expenses violate the dictates of the Bankruptcy Code.

The request to establish the Emergency Treatment Fund was made upon proper notice and after hearing, all in accordance with the requirements of 11 U.S.C. § 363(b). The presumption of reasonableness attached to the Debtor's exercise of its business judgment and the district court correctly granted the requested relief. The court of appeals, as illustrated above, did not appreciate the import of § 363(b) and erroneously reversed the district court's decision.

(b) Permissible Distributions Under The Bankruptcy Code.

The court of appeals concluded that the payment of any monies to health care providers from the fund would, in essence, constitute an unlawful interim distribution to pre-petition creditors of the debtor. This conclusion reflects an understanding of the Bankruptcy Code that does not comport with the modern-day realities of mass-tort or environmentally driven bankruptcies. More specifically, the lower court's restrictive view of the prohibition on interim distributions, a concept itself not found in the Bankruptcy Code, necessarily embodies the notion that each pre-petition creditor must receive payment simultaneously under a plan of reorganization. Not only is this not the law generally, but the case now before the Court illustrates starkly why this cannot be the law.

It is simply a practical impossibility to provide for simultaneous payment to all creditors in bankruptcy cases such as this where there exist tens of thousands of unliquidated personal in-

jury claims. Each claim must first be evaluated and liquidated. In this sense, this case presents the same challenge as that faced by the asbestos-related reorganizations, namely that some mechanism must be employed to liquidate and pay the personal injury claims over a period of years. Manifestly, all claims cannot be liquidated and paid simultaneously.

In contrast, payment of other unsecured, non-personal injury claims which are liquidated is easily accomplished within days of the confirmation of a plan of reorganization. The Bankruptcy Code recognizes no distinction between the timing of payment of liquidated and unliquidated unsecured claims, however. Thus, the premise of the court of appeals that all unsecured claims must, in all circumstances, be paid simultaneously is legally incorrect and impossible of achievement as a practical matter. Nevertheless, that appears to be the principle of law that provided the rule of decision below and, thus, it is important that this Court review that judgment.

(c) Public Policy Considerations.

The policy ramifications of the lower court's decision are troublesome in the extreme in view of the burgeoning use of the bankruptcy laws by distressed companies facing enormous liabilities from defective products and environmental disasters. The establishment of the Emergency Treatment Fund represents but one example of judicial recognition of the novel issues presented by such cases and of creative efforts to address such problems within the strictures of the Bankruptcy Code and consistent with sound public policy. Indeed, this Court has already recognized the need to interpret the Bankruptcy Code in a fashion that will not allow its provisions to become a prescription for a public health disaster. *See Midlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986).

The petitioner has suggested several unfortunate scenarios that will inevitably eventuate if the approach of the court of appeals becomes the law of the land. Contrary to the theme of this Court's reasoning in *Midlantic*, the lower court's decision would

not only permit a polluter to escape its environmental responsibilities during the pendency of its bankruptcy—it would affirmatively require the damage to worsen by prohibiting ameliorative expenditures from the debtor's resources. Such a doctrine is, at best, questionable law; and it is unquestionably not sound public policy.

Conclusion

The decision of the court of appeals is not reflective of the realities attending the ever-increasing number of bankruptcies engendered by massive liabilities for defective products and environmental damage. The question presented is both important and uniquely federal and this Court should issue a writ of certiorari to review the decision of the court of appeals.

Dated: February 17, 1988

Respectfully submitted,

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